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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

DEERBROOK PAVILION, L.L.C.,
Petitioner,

vs.

DONNA E. SHALALA, ET AL.,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

HARVEY M. TETTLEBAUM*
HUSCH & EPPENBERGER, LLC
235 EAST HIGH STREET
JEFFERSON CITY MO 65101
OFFICE: (573) 635-9118
FAX: (573) 634-7854

MARK G. ARNOLD
HUSCH & EPPENBERGER, LLC
100 NORTH BROADWAY, SUITE 1300
ST. LOUIS, MO 63102
OFFICE: (314) 421-4800
FAX: (314) 421-0239
ATTORNEYS FOR PETITIONER

*Counsel of Record

St. Louis Law Printing, Inc. 14239 Manchester Rd. Manchester, MO 63011 314-231-4477

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IN THE UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

No. 99-4179-CV-C-SOW-ECF

DEERBROOK PAVILION, LLC,

Plaintiff,

vs.

DONNA E. SHALALA, et al.,

Defendants.

ORDER

Before the Court is the Federal Defendants' Motion to Dismiss (Doc. #29), plaintiff's Memorandum in Opposition (Doc. #35), Federal Defendants' Reply (Doc. #37), the State Defendants' Motion to Dismiss (Doc. #30), plaintiff's Memorandum in Opposition (Doc. #36), and plaintiff's Motion for Leave to File Suggestions in Opposition to Federal Defendants' Motion to Dismiss in Excess of the Page Limit Imposed by Local Civil Rule 7.1 (Doc. #34). The various motions will be discussed in turn.

I. Background

The controversy at hand concerns a civil money penalty imposed by the federal Health Care Financing Administration ("HCFA") upon Deerbrook Pavilion, L.L.C. ("Deerbrook"), an entity that operates a nursing home in Kansas City, Missouri. Specifically, Deerbrook complains of the manner and circumstances surrounding the imposition of the monetary penalty.

Deerbrook began operating the facility in question in early 1997. In 1996, during the operation of the nursing home by the entity which preceded Deerbrook, federal auditors discovered health and safety violations. This discovery led to the imposition of civil monetary penalties. When Deerbrook began operating the facility, it simply continued the previous Medicare provider agreement instead of applying for a new one. One major advantage of this strategy was that the flow of Medicare dollars to the facility would not be interrupted by administrative red tape. An unforeseen disadvantage, however, and the reason for this lawsuit, is that the civil monetary penalties were enforced by the HCFA not against the previous nursing home operator, but on Deerbrook, the successor to the facility and the Medicare provider agreement.

Plaintiff complains that this action by the government is a violation of its due process rights secured by the Constitution. Defendants contend that an imposition of civil monetary penalties "travels" with the Medicare provider agreement and therefore properly has been levied on Deerbrook.

II. Standard

Rule 12(b)(6) of the Federal Rules of Civil Procedure permits a party to move for a dismissal based on a failure to state a claim upon which relief can be granted. Dismissal under Rule 12(b)(6) "is inappropriate unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *McCormack v. Citibank, N.A.*, 979 F.2d 643, 646 (8th Cir. 1992) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). When considering a motion to dismiss, an assumption must be made that all the facts

alleged in the complaint are true and a dismissal may be granted "only if it is clear that no relief can be granted under any set of facts that could be proved consistent with the allegations." *Alexander v. Peffer*, 993 F.2d 1348, 1349 (8th Cir. 1993) (citation omitted).

III. Discussion

As an initial matter, the Court takes up plaintiff's motion to file an opposition to the Federal Defendants' Motion to Dismiss in excess of the local rule page limit. Pursuant to Local Rule 7.1(f) and for good cause shown, plaintiff's motion is granted.

In their motion to dismiss, the Federal Defendants raise several issues. The first is a lack of subject matter jurisdiction over the causes of action stated in plaintiff's complaint. This issue will be addressed first by the Court.

A. Jurisdiction over Claims Against Federal Defendants

Plaintiff's complaint relies upon three statutes for jurisdiction over the claims asserted against the Federal Defendants: 28 U.S.C. § 1331, 28 U.S.C. § 1343, and 5 U.S.C. § 702. As a preliminary matter, it is apparent that the claims against the Federal Defendants satisfy the requirements of Section 1331, the general federal question statute. Counts I, III, IV, and V all are based on the Fifth Amendment of the Constitution, and therefore "arise under the Constitution, laws or treaties of the United States." 28 U.S.C. § 1331. Likewise, all four of the above counts in plaintiff's complaint are "civil actions" as required by the statute. Therefore, plaintiff's claims meet this preliminary threshold.

However, the real jurisdictional issue presented is whether the United States has consented to suit by waiving its sovereign immunity. Plaintiff points to 5 U.S.C. § 702 as the relevant waiver statute. Section 702 states, in pertinent part:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party.

5 U.S.C. § 702. It is apparent that plaintiff's claims fall squarely under Section 702. Plaintiff complains of an action perpetrated by an agency of the United States while acting in its official capacity and sues only for equitable relief and not money damages.

Cases addressing similar factual situations have also come to the same conclusion of a waiver of sovereign immunity. In fact, in a case involving a challenge to an agency action by the Department of Justice, the Eighth Circuit expressly stated, "[d]istrict courts have jurisdiction under [28 U.S.C.] § 1331 to hear cases falling within § 702's consent to suit." *Black Hills Institute of Geological Research v. South Dakota School of Mines and Technology*, 12 F.3d 737, 740 (8th Cir. 1993) (citing *Califano v. Sanders*, 430 U.S. 99, 105 (1977)). Nothing could be plainer than this statement of jurisdiction

concerning the same statutes relied upon by plaintiff in the present case.

The Federal Defendants argue, however, that plaintiff's claim for equitable relief is merely a thinly disguised evasion of the ban on suits for money damages contained in Section 702. This argument fails. One need look no further than *Bowen v. Massachusetts* for an appropriate discussion of this issue. In *Bowen*, the Supreme Court squarely addressed the issue of what constitutes "relief other than money damages" under Section 702. *Bowen v. Massachusetts*, 487 U.S. 879, 893-94 (1988). The Court held that just because the object of suit is to force a party to pay money to another, this by itself does not make the suit one for "money damages." *Id.* at 894. "[I]nsofar as the complaints sought declaratory and injunctive relief, they were certainly not actions for money damages. . . . The fact that a judicial remedy may require one party to pay money to another is not a sufficient reason to characterize the relief as "money damages." *Id.* at 893. Based on this precedent, it is apparent that the equitable relief sought by plaintiff herein does not qualify as money damages. It follows that the United States has waived sovereign immunity in this case and this Court has jurisdiction over the proceedings.

B. Motion to Dismiss

The Federal and State Defendants move this Court to dismiss plaintiff's claims for failure to state a claim upon which relief can be granted. Plaintiff's claims are an array of Fifth Amendment constitutional issues, from an allegation of a violation of procedural and substantive due process to improper taking without compensation. The scope of the issue before the Court,

however, need not be so expansive. This case is about whether the HCFA has the power to assign and enforce civil money penalties against subsequent owners of skilled nursing facilities that have previously incurred such penalties.

In order to receive reimbursement under Medicare, a facility must have a provider agreement with HCFA. 42 C.F.R. § 489.3. This provider agreement may be obtained by application to HCFA or by default through a change of ownership of a facility operating under a current provider agreement. When such a change of ownership occurs and the existing provider agreement is automatically assigned to the new owners, the new owners assume the agreement subject to all the terms and conditions under which the agreement was originally issued. 42 C.F.R. § 489.18(c), (d). These assumed terms and conditions include, "but [are] not limited to, the following: (1) Any existing plan of correction. (2) Compliance with applicable health and safety standards. (3) Compliance with the ownership and financial interest disclosure requirements . . . . (4) Compliance with civil rights requirements . . . ." 42 C.F.R. § 489.18(d).

Plaintiff argues that it merely leased the facility in question, and therefore is not an owner of the facility which must assume the agreement and all of its terms and conditions. This position is contravened by the plain language of the interpretive regulations. "The lease of all or part of a provider facility constitutes change of ownership of the leased portion." 42 C.F.R. § 489.18(a)(4). Thus, since plaintiff leased the facility, it qualifies as the "owner" of that facility for the purposes of the Medicare provider agreement, and becomes

subject to the history associated with that provider agreement.

The next argument put forward by plaintiff challenges the authority of the HCFA to impose on a subsequent owner a civil monetary penalty which was originally assessed on the previous owner of the provider agreement for regulatory violations in connection with the operation of the same facility. Very little in the way of reported cases touch on this specific issue. One case which does shed light in this area is *U.S. v. Vernon Home Health*, 21 F.3d 693 (5th Cir. 1994). In *Vernon*, plaintiff had purchased the assets of a corporation which held a Medicare provider agreement, thereby becoming an owner for the purposes of the provider agreement. *Vernon*, 21 F.3d at 694. After the purchase had taken place, the federal government ascertained that it had overpaid the reimbursement owed to the prior owner under the provider agreement. *Id.* Taking the position that the plaintiff, as new owner under the agreement, was now liable for the return of the overpayment amount, the government sued for reimbursement. *Id.*

The *Vernon* decision is the same as the controversy before this Court in all respects save two. First, plaintiff in *Vernon* had purchased the assets of the original provider agreement owner, and plaintiff here has merely leased the facility in question. This distinction makes no difference to the analysis. As was discussed above, 42 C.F.R. § 489.18(a)(4) expressly states that the lease of a provider facility is a change of ownership. Therefore, the distinction between a purchase of assets and a lease agreement is of no substance.

The second distinction is that the HCFA in *Vernon* deemed plaintiff to be liable for an overpayment made to

plaintiff's predecessor of a Medicare reimbursement, while plaintiff here has been deemed liable by HCFA for payment of a civil money penalty imposed upon its predecessor. The *Vernon* court began with the proposition that any transaction which results in "the assignment of the provider agreement is subject to the relevant statutory and regulatory conditions." *Id.* at 696. The relevant statutory condition in that case was 42 U.S.C. § 1395g(a), which provides for adjustments to be made for overpayments. Thus, the plaintiff in *Vernon* was liable for the overpayment adjustment, even though the practical effect of the decision was to require plaintiff to repay money to the government which it had never received in the first place. *Id.*

The issue of the assignment of civil penalties before this Court is quite similar. Plaintiff was automatically assigned the provider agreement its predecessor held, the same agreement under which the predecessor incurred civil money penalties. These penalties were assessed pursuant to relevant federal statutes providing for the imposition of "a civil money penalty . . . for each day of noncompliance" with certain regulations. 42 U.S.C. § 1395i-3(h)(2)(B)(ii) (penalties under Medicare); *see* 42 U.S.C. § 1396r(h)(2)(A)(ii) (analogous penalties under Medicaid). An assigned agreement remains subject to all relevant statutes, regulations, terms and conditions under which it was originally issued. 42 C.F.R. § 489.18(d). Therefore, adopting the reasoning of *Vernon*, it follows that plaintiff is properly subject to the civil money penalties imposed upon it by HCFA.

IV. Conclusion

The Court finds that defendant's actions were taken pursuant to the authority given by the existing statu-

tory and regulatory scheme. As a result, plaintiff fails to state a claim upon which relief can be granted, and it is hereby

ORDERED that defendants' motions to dismiss (Docs. 29, 30) are granted. It is further

ORDERED that plaintiff's motion for leave to file in excess of the local page limit (Doc. #34) is granted.

s/ Scott O. Wright
SCOTT O. WRIGHT
Senior United States District Judge

Dated: *11-4-99*

UNITED STATES DISTRICT COURT

Western District of Missouri
CENTRAL DIVISION
JUDGMENT IN A CIVIL CASE

Case Number: 99-4179-CV-C-SOW-ECF

DEERBROOK PAVILION, LLC,

Plaintiff,

v.

DONNA E. SHALALA, et al.,

Defendants.

_ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that defendants' motions to dismiss (Docs. 29, 30) are granted.

It is further

ORDERED that plaintiff's motion for leave to file in excess of the local page limit (Doc. #34) is granted.

_ENTERED ON:

Date
November 5, 1999

P.L. BRUNE
Clerk

(By) Deputy Clerk

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